

STATE OF NORTH CAROLINA
COUNTY OF PAMLICO

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
10 EDC 3581

Student, BY GUARDIAN, *Grandparent*,)
Petitioners,)
)
v.)
)
PAMLICO COUNTY BOARD OF)
EDUCATION,)
Respondent.)
)

**FINAL DECISION
ORDER OF DISMISSAL**

THIS MATTER comes before the undersigned Administrative Law Judge, on Respondent's Motion to Dismiss Petition for Contested Case Hearing. Petitioners have filed a Memorandum in Opposition to Respondent's Motion to Dismiss and Respondent has filed a Reply and Memorandum of Law in Support of Respondent's Motion to Dismiss. Petitioners are represented by attorney, Sandra J. Polin. Respondent is represented by attorney, Rachel B. Hitch. After reviewing the Petition, Respondent's Motion and Reply, Petitioners' Response, and all other matters found in the record of this case, along with the applicable law, the Undersigned hereby makes the following ruling based on the standard of review for motions to dismiss.

Standard of Review

Dismissal is appropriate when the face of the complaint clearly reveals the existence of a meritorious affirmative defense. See *Brooks v. City of Winston-Salem*, 85 F.3d 178 (4th Cir. 1996). When reviewing a motion to dismiss, the court construes the allegations brought forth in the complaint in the light most favorable to the pleader (in this instance the Petitioner). See *Scheuer v. Rhodes*, 416 U.S. 232 (1974). The burden of establishing the validity of a motion to dismiss resides with the movant.

When reviewing a motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b), a trial court may consider and weigh matters outside the pleadings. *Department of Transportation v. Blue*, 147 N.C. App. 596, 556 S.E.2d 609 (2001). A court should dismiss an action for want of subject matter jurisdiction if the material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law. *Evans v. B.F. Perkins Co.*, 166 F.3d 642 (4th Cir.1999) (quoting *Richmond, Fredericksburg & Potomac R. Co. v. United States*, 945 F.2d 765 (4th Cir.1991)).

BASED UPON the record of this case, the Undersigned makes the following findings of fact and conclusions of law:

1. Petitioners, *Student*, by guardian, *Grandparent*, filed for a contested case hearing in the Office of Administrative Hearings (OAH) on or about June 28, 2010. Petitioner, *Grandparent*, is *Student*'s great-grandmother. Respondent filed a Motion to Dismiss on July 12, 2010. Petitioner's Memorandum in Opposition to Respondent's motion was filed on July 15, 2010, and Respondent's Reply and Memorandum of Law was filed and received by the Undersigned on July 23, 2010.

2. *Student* (NS) is a minor student identified as a student with a disability under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400, *et seq.* *Student* attended XXX Elementary School located at ***, North Carolina during the 2009-10 academic year.

3. A parent may file a Petition for Contested Case Hearing. 20 U.S.C. §1415(b)(6); 34 C.F.R. 300.507. IDEA defines a parent as the biological or adoptive parent of a child, a foster parent (unless otherwise precluded), a guardian with authority to make educational decisions, an individual with whom the child lives and who is acting as a parent, or a surrogate parent. 20 U.S.C. §1401; 34 C.F.R. 300.30.

4. If a judicial decree or order identifies a specific person to act as the "parent" of a child or to make educational decisions on behalf of a child, then that person shall be determined to be the "parent" for purposes of IDEA. 20 U.S.C. 1401(23); 34 C.F.R. 300.30; North Carolina Policies Governing Services for Children with Disabilities at 1500-2.24.

5. When more than one party is qualified to act as a parent under the Individuals with Disabilities Education Act, the biological or adoptive parent's rights are superior to the rights of anyone else unless the biological or adoptive parent does not have legal authority to make educational decisions for the child. 20 U.S.C. 1401(23); 34 C.F.R. 300.30; North Carolina Policies Governing Services for Children with Disabilities at 1500-2.24.

6. *Father* is *Student*'s biological father. *Father* resides in Clayton, North Carolina which is located in Johnston County. *Father* is not a Petitioner in this case.

7. Prior to June 10, 2010, *Student* lived with Petitioner *Grandparent* and her husband, *Student*'s great-grandparents. In fact, the *Grandparents* have raised *Student* in their home in Pamlico County since he was eight months old. They also raised *Student*'s father, (Father), their grandson, in their home.

8. The grandparents had primary custody of *Student* pursuant to a Temporary Custody Order dated January 4, 2010, signed by the Honorable Jerry F. Waddell, Pamlico County District Court Judge. The Temporary Custody Order transferred primary custody of *Student* to his father, effective June 10, 2010.

9. The Temporary Custody Order recites that it is a Consent Order and that the Parties including *Grandparents* and *Father* memorialized their agreement to the terms of *Student's* custody through a Memorandum of Order signed by the Honorable Judge Jerry F. Waddell on December 18, 2009.

10. Petitioners cite in their Response that, “*Grandparents* secured new counsel and are now seeking to invalidate the custody consent agreement.”

11. *Student* moved to the home of *Father* on or about June 10, 2010, and has resided with *Father* since then, as contemplated in the Temporary Custody Order.

12. On June 16, 2010, the Pamlico County Schools received notification that *Student* had enrolled in XX Elementary School, located at ***, ***, North Carolina.

13. The Petition for a Contested Case Hearing in this matter was filed on June 28, 2010, by Petitioner, *Grandparent*.

14. At the time the Petition for a Contested Case Hearing against Respondent Pamlico County Board of Education was filed on June 28, 2010, *Grandparent* did not have actual or legal custody of *Student* and was not a “parent” of *Student* pursuant to the IDEA. In fact at that time, *Student* was physically living with *Father*, who had sole custody of his son, *Student*, in Johnston County.

15. By Affidavit dated July 21, 2010, *Father* states, “During the 2009-10 school year, I was in communication with the Pamlico County Schools regarding *Student's* education. I was pleased with the services the school system provided to *Student*.” *Father* goes on to state, “I oppose the Petition that *Grandparent* has filed against the Pamlico County Board of Education.” Even if *Grandparent* were considered a “parent” as of June 28, 2010, her rights under IDEA would be inferior to those of *Father*, *Student's* biological father.

16. *Grandparent* lacks standing to bring this action against the Pamlico County Board of Education.

17. In the absence of standing, there is no subject matter jurisdiction. *Yates for McCombs v. N.C. Dept. of Human Resources*, 98 N.C. App. 402 (1990); *Fuentes v. Board of Educ. of City of New York*, 540 F.3d 145(2nd Cir. 2008).

FINAL DECISION

BASED ON the foregoing, the Respondent's Motion to Dismiss is granted for lack of standing which divests the Office of Administrative Hearings of subject matter jurisdiction.

Due to the nature and circumstances of the above matter and this dismissal, it is hereby **ORDERED** that this contested case be **Dismissed without Prejudice**.

NOTICE

The North Carolina Department of Public Instruction has notified the Office of Administrative Hearings that a Final Decision based on an Order of Dismissal is not subject to appeal to the NC Department of Public Instruction.

Pursuant to the provisions of NORTH CAROLINA GENERAL STATUTES Chapter 150B, Article 4, any party wishing to appeal the final decision of the Administrative Law Judge may commence such appeal by filing a Petition for Judicial Review in the Superior Court of Wake County or in the Superior Court of the county in which the party resides. The party seeking review must file the petition within 30 days after being served with a written copy of the Administrative Law Judge's Decision and Order. N.C. GEN. STAT. § 150B-46 describes the contents of the Petition and requires service of the Petition on all parties. Pursuant to N.C. GEN. STAT. § 150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of Superior Court within 30 days of receipt of the Petition for Judicial Review. Consequently, a copy of the Petition for Judicial Review must be sent to the Office of Administrative Hearings at the time the appeal.

In the alternative, any person aggrieved by the findings and decision of this Final Decision, Order of Dismissal may institute a civil action in the appropriate district court of the United States as provided in Title 20 of the United States Code, Chapter 33, Subchapter II, Section 1415 (20 USC 1415). Procedures and time frames regarding appeal into the appropriate United States district court are in accordance with the aforementioned Code cite and other applicable federal statutes and regulations. A copy of the filing with the federal district court should be sent to the Exceptional Children Division, North Carolina Department of Public Instruction, Raleigh, North Carolina so that the records of this case can be forwarded to the court.

IT IS SO ORDERED.

This the 2nd day of August, 2009.

Augustus B. Elkins II
Administrative Law Judge